STATE OF MICHIGAN

COURT OF APPEALS

S-S, LLC,

Plaintiff-Appellant/Cross-Appellee,

v

MERTEN BUILDING LIMITED PARTNERSHIP, and CORAL REEF INVESTMENTS LLC,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
October 22, 2015

No. 322504
Ingham Circuit Court
LC No. 12-001185-CB

Before: M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order of dismissal. In the cross-appeal, defendants appeal as of right an order denying defendants' motion for sanctions. We affirm both orders.

I. FACTS

A. BACKGROUND

This appeal arises out of a dispute among the members of Meridian Investors, LLC ("Meridian"). Meridian was formed by S-S, LLC (S-S), Merten Building Limited Partnership (Merten Building), and Coral Reef Investments, LLC (Coral Reef), with each owning a 33.33 percent interest. The sole members of Coral Reef are William Hicks and Brian Hicks; they are also the sole partners of Hicks Brothers Real Estate L.L.P. (Hicks Brothers). The only asset of Meridian is commercial and residential rental property located in Okemos, Michigan. Meridian is governed by an operating agreement ("the operating agreement") that requires that "all decisions to be made by the Members shall be agreed to by the affirmative vote or consent of all the Sharing Ratios of all the Members." The operating agreement also provides that "nothing in [the operating agreement] shall preclude the employment, at the expense of [Meridian], of any agent or third party to assist in such management or to provide other services in respect of the Company properties or administrative matters."

In 1997, Hicks Brothers began providing property management services to Meridian. In 2006, S-S attempted to terminate Hicks Brothers as property manager by sending a letter of termination, but Hicks Brothers continued to manage Meridian's property. S-S requested two

special meetings with comembers Coral Reef and Merten Building with regard to the termination of Hicks Brothers, but no member of Merten Building and Coral Reef appeared in person at the meetings. S-S also requested certain documents and financial records of Meridian, but such requests were refused by Merten Building and Coral Reef.

> On February 21, 2008, [S-S] sued Hicks Brothers, Merten Building, and Coral Reef. Count I of [S-S's] complaint alleged a breach of operating agreement and violation of MCL 450.4503 as to [Hicks Brothers, Merten Building, and Coral Reef] with regard to [S-S's] two unsuccessful attempts to secure particular Meridian documents and records. Count II alleged a breach of operating agreement and violation of MCL 450.4515 as to [Hicks Brothers, Merten Building, and Coral Reef] with regard to the appointment and continued employment of Hicks Brothers as property manager of Meridian, as well as Merten Building and Coral Reef's failure to attend the two special meetings called by S-S in that regard. Count III alleged breach of fiduciary duties as to [Hicks Brothers, Merten Building, and Coral Reef]. Count IV alleged that Merten Building and Coral Reef acted to "freeze out" S-S, a minority member of Meridian. Count V alleged a civil conspiracy as to [Hicks Brothers, Merten Building, and Coral Reef]. Count VI was a derivative action claim pursuant to MCL 450.4510. Count VII alleged that Hicks Brothers were not entitled to any payment for their property management services; thus, [S-S] asserted a claim for disgorgement of profits. Count VIII was a request for declaratory judgment as to [Hicks Brothers, Merten Building, and Coral Reef], primarily requesting a declaration of the parties' respective rights with regard to the termination of Hicks Brothers. And Count IX requested injunctive relief. Following cross motions for summary disposition pursuant to MCR 2.116(C)(10), the trial court granted [S-S's] motion in full as to Count I and in part as to Count VIII, allegations pertaining to [Hicks Brothers, Merten Building, and Coral Reef's] failure to provide requested documents regarding Meridian. The trial court granted [Hicks Brothers, Merten Building, and Coral Reef's] motion in full as to Counts II through VII and Count IX, and in part as to Count VIII.

On November 18, 2010, this Court affirmed the trial court's order. See *S-S, LLC v Merten Bldg Ltd Partnership*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2010 (Docket No. 292943). Relevant to this appeal, this Court concluded that plaintiff consented to the employment of Hicks Brothers as the property manager and that S-S could not unilaterally terminate Hicks Brothers as property manager because the decision to do so required affirmative vote or consent of all of the members. *Id*. at 4-5.

After the Court of Appeals opinion, plaintiff and defendants did not amend the operating agreement or vote to remove Hicks Brothers as property manager. As a result, Hicks Brothers remained the property manager for Meridian. In 2011 through 2013, Meridian expended money on repairs and maintenance to the property. Plaintiff and defendants did not vote prior to Meridian expending money on any of the repairs or maintenance that it incurred.

B. PROCEDURAL HISTORY

On October 31, 2012, plaintiff filed a complaint seeking declaratory relief against defendants' and alleged that Coral Reef breached the Meridian operating agreement by distributing Meridian's funds without obtaining member approval and that Merten breached the operating agreement by arranging insurance contracts for Meridian without obtaining member approval. Plaintiff also sought injunctive relief to order defendants to cease and desist carrying out business for Meridian without member approval.

On October 15, 2013, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7), asserting that plaintiff's claim was barred by res judicata. In opposition to defendants' motion, plaintiff argued that plaintiff's complaint was not barred by res judicata because the instant lawsuit arose out of facts after the first lawsuit was decided. Plaintiff also moved for summary disposition pursuant to MCR 2.116(C)(10) and argued that no genuine issue of material fact existed regarding whether defendants' breached the operating agreement.

The trial court subsequently entered an order denying plaintiff's and defendants' motions. The trial court concluded that plaintiff's complaint was not barred by res judicata as the issues raised by plaintiff were not adjudicated, nor could they have been adjudicated, in the previous action. The trial court also determined that there was a genuine issue of material fact regarding the allegations set forth in plaintiff's complaint.

On April 15, 2014, the parties appeared for trial. After the close of plaintiff's proofs, defendants moved for a directed verdict on the grounds that plaintiff's claim was barred by res judicata and that plaintiff failed to establish a prima facie case. The trial court granted defendants' motion for a directed on the basis that plaintiff's claim was barred by res judicata and because there was "a lack of evidence presented by the plaintiff to support any factual allegations."

II. PLAINTIFF'S APPEAL

Plaintiff contends that the trial court erred when it granted defendant's motion for a directed verdict on the basis that plaintiff's claims were barred by res judicata.

A trial court's decision on a motion for directed verdict is reviewed de novo. *Zantel Mktg Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). "The appellate court reviews all the evidence presented up to the time of the directed verdict motion, considers that evidence in a light most favorable to the nonmoving party, and determines whether a question of fact existed." *Id*. "A motion for directed verdict is properly granted only when there is no factual question upon which reasonable minds could differ." *Heaton v Benton Constr Co*, 286 Mich App 528, 532; 780 NW2d 618 (2009).

A. RES JUDICATA

"Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). More specifically, the doctrine bars a second, subsequent action when "(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008).

There is no dispute that the parties in this case were also parties in the first case. The parties also do not dispute that the earlier action was decided on the merits as summary disposition was granted in favor of defendants and was affirmed on appeal by this Court. In dispute is whether "the matter contested in the second action was or could have been resolved in the first." *Estes*, 481 Mich at 585. Michigan courts "have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Dart*, 460 Mich at 586.

1. PLAINTIFF'S FACTUAL ALLEGATIONS

Plaintiff's factual allegations in the instant action revolve around the disbursement of money in Meridian's bank account and the arrangement of insurance contracts for Meridian from 2011 to 2013, whereas the prior lawsuit revolved around events occurring from 1997 to 2006. Because the present case involves facts and events that occurred *after* those involved in the first dispute, plaintiff's claims were not already litigated and plaintiff could not have brought these claims in the first action. *Id*. Therefore, the doctrine of res judicata is inapplicable to plaintiff's factual allegations.

2. PLAINTIFF'S REQUEST FOR DECLARATORY RELIEF

Plaintiff's request for declaratory relief is barred by res judicata because plaintiff's request for declaratory relief either was, or could have been resolved, in the first action. In its complaint in this action, plaintiff specifically requested that the trial court declare the voting rights of the members as specified in the operating agreement. In the prior action between the parties, the central focus revolved around the voting rights of the parties. In fact, this Court held, when addressing whether plaintiff had the ability to unilaterally terminate Hick Brothers as property manager, the ordinary and plain language of the operating agreement required that "[a]ll decisions to be made by the Members shall be agreed to by the affirmative vote or consent of all the Sharing Ratios of the members. . . ." Thus, the issue regarding members' voting rights and how many members needed to vote or agree on a particular issue under the operating agreement was actually and necessarily determined in the prior proceeding between the parties. Therefore, at the time of the first lawsuit, plaintiff could have brought a claim for declaratory relief raising all issues surrounding the voting rights of the parties, but did not. Because claims that could have been raised in the first action are barred by res judicata, the trial court properly granted defendants' motion for a directed verdict. *Id*.

B. INSUFFICIENT EVIDENCE

As to the factual allegations, the trial court properly granted defendants' motion for directed verdict on the basis that plaintiff failed to establish a prima facie case to support its claim. In its complaint, plaintiff alleged that Coral Reef breached the operating agreement in 2011 and 2012 by distributing Meridian's funds without obtaining member approval. However, the evidence established that Meridian's bank account was maintained by Hicks Brothers, not Coral Reef. The evidence also established that Coral Reef never wrote a check on behalf of Meridian. No evidence was presented that Coral Reef made a distribution of Meridian funds. Accordingly, the trial court properly granted defendants' motion for a directed verdict.

Plaintiff also alleged that Merten Building breached the operating agreement by arranging insurance contracts for Meridian without obtaining member approval. Contrary to plaintiff's allegation, the evidence established that Hicks Brothers arranged the insurance contracts for Meridian, not Merten Building. Thus, there was no factual dispute regarding whether Merten Building arranged insurance contracts without obtaining member approval. The trial court properly granted defendants' motion for a directed verdict.

III. DEFENDANTS' APPEAL

Defendants argue that the trial court erred in denying their motion for sanctions based on plaintiff filing a frivolous claim. We review a trial court's findings regarding whether an action is frivolous for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. at 661-662.

"Awards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception." *Holton v Ward*, 303 Mich App 718, 734; 847 NW2d 1 (2014), quoting *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010). MCL 600.2591 states that "if a court finds that a civil action . . . was frivolous, the court that conducts the civil action shall award the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney." MCL 600.2591(1). MCL 600.2591(3) defines "frivolous" to mean that at least one of the following is met: (1) the primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party, (2) the party had no reasonable basis to believe that the facts underling the party's legal position were in fact true, or (3) the party's legal position was devoid of arguable legal merit. MCL 600.2591(3). Whether a claim is frivolous within the meaning of MCL 600.2591 will depend upon the facts of the case. *Kitchen*, 465 Mich at 663.

Defendants argue that plaintiff's claims were frivolous because plaintiff's legal positions were devoid of arguable legal merit as its claims were barred by res judicata and because plaintiff had no reasonable basis to believe that the facts underlying plaintiff's legal positions were true. First, as discussed previously, plaintiff's claims were not completely barred by res judicata. Second, this Court has previously held that a "plaintiff's inability to prove its case by a preponderance of evidence at trial does not merit a finding that its claim was frivolous." *Jerico Const, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). While plaintiff's claims were not successful, they were not completely groundless or devoid of arguable legal merit. MCL 600.2591(3). Therefore, the trial court's finding was not clearly erroneous.

Finally, defendants also request this Court to sanction plaintiff for filing a vexatious appeal. However, MCR 7.211(C)(8) indicates that a motion for sanctions must be made by motion, not in a brief. Here, plaintiff has failed to file a motion as required by the court rule. Additionally, defendants do not discuss how plaintiff's appeal is vexatious; rather, defendants merely assert that they are entitled to sanctions. It is not sufficient for a party to merely announce its position on appeal and leave it to this Court to discover and rationalize its claims. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). In any event, the appeal was not vexatious. Accordingly, defendants are not entitled to relief.

IV. CONCLUSION

For the reasons stated herein, we affirm the trial court's order of dismissal and its order denying defendants' motion for sanctions.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro